

USALSA Report

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Environmental Law Division Notes

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Army Issues Interim Guidance on CERCLA Five-Year Reviews

On 5 April 2000, the Army issued interim guidance¹ on how to conduct five-year reviews in accordance with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).² Both CERCLA and its implementing regulations, the National Contingency Plan (NCP), require a periodic review of cleanup remedies that limit a property's use or access.³ Because the Department of Defense is the lead agent in cleanup of its sites,⁴ each of the services is required to conduct five-year reviews when appropriate. The Army has compiled interim guidance to assist with this process. This guidance would come into play at sites where the remedial action specified in the Record of Decision (ROD) or applicable CERCLA decision document would allow hazardous substances, pollutants or contaminants to remain in place above levels that would allow for unlimited use or unrestricted exposure. The Army's interim guidance is applicable to active Army installations and Base Realignment and Closure (BRAC) installations, as well as National Priorities List (NPL) and non-NPL sites.⁵ The guidance ensures that five-year reviews are conducted in a timely, consistent manner. The new guidance also provides explicit instructions regarding the programming of funds to provide for the expenses of five-year reviews.

Why Do Five-Year Reviews?

The purpose of a CERCLA five-year review is to ensure the protection of human health and the environment.⁶ Such a review provides the Army with the information it needs to confirm that its CERCLA remedy is functioning as planned. Generally, the review focuses on the adequacy of active treatment remedies, long-term monitoring, and the imposition of land use controls. One of the main objectives of this process is to evaluate whether cleanup levels remain protective. If the remedy is not protective or fully functional, the Army, as lead agent, is empowered to take steps to deal with the situation.⁷ The Army may also choose to stop doing five-year reviews when they are no longer needed, so the requirements for termination are set forth in the new policy.

What Triggers a Five-Year Review?

Under CERCLA, the five-year review requirement is set into motion when a decision maker selects a remedial action that "results in any hazardous substances, pollutants, or contaminants remaining at the site"⁸ The NCP is more specific. It states that a five-year review is triggered if the selected remedial action will allow hazardous substances, pollutants, or contaminants to remain at the site "above levels that allow for unlimited use and unrestricted exposure"⁹ This conclusion would be incorporated into the site's ROD or applicable decision document and the date upon which it was finalized will become the starting time for projecting a five-year review.

Focus of the Five-Year Review

Though complex remedies may require specific approaches, the reviewer will generally try to answer the following questions:

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1. Memorandum, Assistant Chief of Staff for Installation Management, SFIM-AEC-ERO, to All MACOMs, subject: Interim Army Guidance for Conducting Five-year Reviews, encl. (5 Apr. 2000). This Army interim guidance sometimes tracks the Environmental Protection Agency's (EPA) interim policy on five-year reviews. See Environmental Protection Agency, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE (OSWER), COMPREHENSIVE FIVE-YEAR REVIEW GUIDANCE (Oct. 1999).
 2. 42 U.S.C.S. § 9601 (LEXIS 2000).
 3. *Id.* § 9621(c); 40 C.F.R. § 300.430(f)(4)(ii) (1999).
 4. 42 U.S.C.S. § 9604(a), (b); Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).
 5. Note that five-year reviews on active and BRAC sites will involve different funding sources.
 6. 42 U.S.C.S. § 9621(c).
 7. See generally *id.* §§ 9604(a), (b), (e), 9606(a), 9620.
 8. *Id.* § 9621(c).

- (1) Is the remedy functioning as intended?¹⁰
- (2) Are the assumptions used to select the remedy still valid?
- (3) Has new information arisen that would cause the reviewer to question the protectiveness of the remedy?
- (4) Does the remedy remain cost-effective?¹¹

What Data Should be in the Five-Year Review?

In a nutshell, the five-year review report should summarize technical data, laws and regulations (applicable and relevant and appropriate requirements), site-visit observations, reports on treatment-systems operations and determinations on the effectiveness of land use controls. The review should conclude with a determination stating whether or not the remedy is protective of human health and the environment. Should the reviewer determine that modifications are needed to improve remedy operation, the report should outline the proposed changes and work schedules.

Regulator Review and Comment

An important element of the Army interim guidance is its procedure allowing for review and comment by the Environmental Protection Agency (EPA) and state regulators. This provision is intended to resolve confusion over the role played by regulators in the course of a five-year review at an Army site. One source of this confusion is that the EPA at NPL sites may be granted a concurrence role, via a Federal Facilities Agreement (FFA), over remedies and subsequent remedy modifications. If such concurrence authority is granted by an FFA (an interagency agreement), the EPA could possess a greater level of authority to accept or decline the conclusions stated in a five-year review. Note, though, that FFA terms may differ, so this extension of EPA authority is not automatically granted. Also, FFAs are limited to NPL sites—at non-NPL sites, the EPA lacks

the authority to concur in five-year reviews.¹² Likewise, state regulators are not granted concurrence authority over a lead agent's remedy determination.¹³ However, information provided by both the EPA and state regulators can be very beneficial when compiling a five-year review, so the Army's interim policy provides for such input.

Making the Procedure Regular

The new guidance sets forth specific provisions on the funding and staffing of five-year reviews, while outlining the scope of the document. This will provide for greater regularity among reports. The interim guidance states a preference for having active installations prepare their own five-year reviews, while the major command (MACOM) would determine the executor for BRAC sites. The U.S. Army Corps of Engineers is a good resource to consider when selecting an executor to conduct the reviews. Once the draft report is complete, the U.S. Army Environmental Center (USAEC) may be called upon to review the document. The USAEC will review the findings of five-year reviews conducted at sites where the remedy's operation and maintenance requirements or long-term monitoring costs exceed \$250,000 a year. When any required USAEC's concurrence is received, the installation commander (or the MACOM designee, in the case of BRAC facilities) will forward the report to the EPA and state regulators for their review and comment. In cases where the EPA or state regulators object to the report's findings, the five-year review executor will work with USAEC and the MACOM to prepare a coordinated response.

Community Involvement

The installation or MACOM designee will place a copy of the final five-year review in the administrative record and information repository. If a site has a Restoration Advisory Board (RAB) or Technical Review Committee, these groups should be advised of plans for a five-year review. Once the review is complete, these groups should be informed of the scope of data considered and the conclusions reached. For sites where there is no active RAB, public notification can be made by newspaper publication. Also, if the five-year review requires a modi-

9. 40 C.F.R. § 300.430(f)(4)(ii) (2000).

10. Here, the ROD or other decision document would be used as the primary source for determining the scope and intent of the remedy.

11. This requirement is intended to ensure that the Army's environmental funds are being spent appropriately.

12. The EPA has claimed that CERCLA § 9620(e)(4)(A) (as amended by Superfund Amendment and Reauthorization Act (SARA)) gives them the right to select a remedial action at NPL sites when the EPA administrator and the lead agent are unable to agree upon the appropriate remedial action. 42 U.S.C.S. § 9601-9675 (LEXIS 2000). However, CERCLA § 9621 states that it is the President who decides cleanup remedies. The President's decision-making authority was delegated to DOD and, subsequently, to the Army. See Exec. Order 12,580, 52 Fed. Reg. 2923 (1987). Accordingly, the EPA does not possess a unilateral right to determine the outcome of a five-year review, unless an installation's FFA specifically provides for such concurrence. See also OSWER DIR. 9355.7-03B-P, COMPREHENSIVE FIVE-YEAR REVIEW GUIDANCE, sec. 2.5.4 (Oct. 1999).

13. 40 C.F.R. § 9620(a)(4). This CERCLA provision distinguishes between NPL and non-NPL sites. The EPA has authority to deal with NPL sites. On NPL sites, the FFA may grant the EPA "concurrence authority" over five-year review findings. However, state regulators deal with non-NPL sites. These cleanups do not involve FFAs, so there would be no standard agreement to provide state regulators with a concurrence role.

fication to the ROD, the NCP's community participation requirements would come into play.¹⁴ Copies of the Army interim guidance will be posted on the Web in the near future. Ms. Barfield.

The Superfund Recycling Equity Act of 1999

As part of the appropriations bill for Fiscal Year 2000, the Congress passed legislation providing a potential defense to arranger liability under the CERCLA. This legislation, entitled the Superfund Recycling Equity Act of 1999,¹⁵ seeks to exempt from the CERCLA liability those who can demonstrate that they arranged for *recycling* of certain materials, as opposed to arranging for disposal of hazardous substances. While federal agencies may be able to avail themselves of the protection of this law, they will certainly will have to expand their investigation of Superfund cases to include new areas of inquiry.

The new law provides that a person who arranges for the recycling of a recyclable material is not liable under sections 107(a)(3) or (a)(4), as long as certain requirements are met. "Recyclable material" is defined as scrap paper, scrap plastic, scrap glass, scrap textiles, scrap rubber (other than whole tires), scrap metal, scrap batteries (including lead-acid and spent nickel-cadmium batteries). The definition of recyclable material also includes "minor amounts of material incident to or adhering to the scrap material as a result of its normal and customary use prior to becoming scrap"¹⁶

For the exemption from liability to apply, the person seeking to claim the recycling exemption must establish *all* of the following requirements by a preponderance of the evidence:

- (1) The recyclable material met a commercial specification grade.
- (2) A market existed for the recyclable material.
- (3) A substantial portion of the recyclable material was made available for use as feedstock for the manufacture of a new salable product.
- (4) The recyclable material could have been a replacement or substitute for a virgin raw material, or the product to be made from the recyclable material could have been a replacement or substitute for a product made,

in whole or in part, from a virgin raw material.

(5) For transactions occurring ninety days or more after the date of enactment of this section, the person exercised reasonable care to determine that the facility where the recyclable material was handled, processed, reclaimed, or otherwise managed by another person (hereinafter in this section referred to as a "consuming facility") was in compliance with substantive (not procedural or administrative) provisions of any federal, state, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, storage, or other management activities associated with recyclable material.¹⁷

For purposes of subsection (5), "reasonable care" includes (but is not limited to) the following criteria:

- (A) the price paid in the recycling transaction;
- (B) the ability of the person to detect the nature of the consuming facility's operations concerning its handling, processing, reclamation, or other management activities associated with recyclable material; and
- (C) the result of inquiries made to the appropriate Federal, State, or local environmental agency (or agencies) regarding the consuming facility's past and current compliance with substantive (not procedural or administrative) provisions of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, storage, or other management activities associated with the recyclable material. For the purposes of this paragraph, a requirement to obtain a permit applicable to the handling, processing, reclamation, or other management activity associated with the recyclable materials shall be deemed to be a substantive provision.¹⁸

14. 40 C.F.R. § 300.435(c)(2)(ii).

15. Act of Nov. 29, 1999, Pub. L. No. 106-113 (codified at 42 U.S.C.S. § 9627 (LEXIS 2000)).

16. 42 U.S.C.S. § 9627(b).

17. *Id.* § 9627(c).

For the scrap metal and scrap batteries categories of recyclable materials, there are additional requirements that must be met.¹⁹

The new law also contains a provision that excludes some transactions from the exemption for recycling. The law states that the exemption does not apply if:

(A) the person had an objectively reasonable basis to believe at the time of the recycling transaction—

(i) that the recyclable material would not be recycled;

(ii) that the recyclable material would be burned as fuel, or for energy recovery or incineration; or

(iii) for transactions occurring before ninety days after the date of the enactment of this section [enacted 29 November 1999], that the consuming facility was not in compliance with a substantive (not procedural or administrative) provision of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, or other management activities associated with the recyclable material;

(B) the person had reason to believe that hazardous substances had been added to the recyclable material for purposes other than processing for recycling; or

(C) the person failed to exercise reasonable care with respect to the management and handling of the recyclable material (including adhering to customary industry practices current at the time of the recycling transaction designed to minimize, through source control, contamination of the recyclable material by hazardous substances).²⁰

The provision then discusses what is an “objectively reasonable basis for belief,” including, but not limited to, the size of the

person’s business, customary industry practices at the time the transaction occurred, the price paid for the material, and the ability of the person to determine the handling activities of the facility to whom it sold the material.²¹

The new law does not apply to concluded administrative or judicial actions, or to “any pending action initiated by the United States prior to enactment of this section.”²² Interestingly, the law also provides that if a PRP attempts to bring a contribution action against a person, but the person against whom the action is brought successfully uses this exemption, the PRP bringing the action will be liable for the successful party’s attorney’s fees.²³

This new law raises a whole host of new issues. It creates another layer of factual disputes, allowing the parties to argue about each requirement for the application of the exemption, such as “reasonable care” in § 9627(c)(6), and each element of the exclusions from the exemption, such as “objectively reasonable belief” and “reasonable care” for purposes of (f). Indeed, it is not difficult to conceive of a situation where the parties would argue whether a certain substance constitutes “minor amounts of material incident to or adhering to the scrap material as a result of is normal and customary use prior to becoming scrap” therefore calling into question whether the definition of “recyclable material” has been met in the first place.

Complicating the resolution of these issues is the fairly cursory legislative history associated with this Act. There have been no congressional hearings concerning this provision, and no congressional reports. The legislative history consists mostly of a statement from Senators Daschle and Lott concerning the provision that was inserted into the congressional record.²⁴

Because the legislative history is relatively sparse, practitioners will be looking to the courts for assistance in interpreting the provisions of the Act. One such decision has been handed down addressing the section of the law concerning pending and concluded actions. As indicated above, 42 U.S.C. § 9627(i) of the new law by its terms specifically does not apply to completed judicial or administrative actions, and to judicial actions commenced by the United States. In *United States v. Atlas Lederer Co.*,²⁵ the district court had the opportunity to interpret this

18. *Id.* § 9627(c)(6).

19. *See id.* § 9627(d), (e).

20. *Id.* § 9627(f)(1).

21. *Id.* § 9627(f)(2).

22. *Id.* § 9627(i).

23. *Id.* § 9627(j).

24. 145 CONG. REC. S15048 (daily ed. Nov. 19, 1999) (statement of Senators Lott and Daschle).

25. 97 F. Supp. 2d 830 (S.D. Ohio 2000).

provision. In that case, the United States had commenced an action against a number of parties, including Livingston & Co. (Livingston). Livingston was also named in a third party complaint brought by a group of settling PRPs.²⁶ Livingston, which had previously lost a summary judgment motion, asked the court to reconsider its ruling in light of the Superfund Recycling Equity Act of 1999.²⁷ Livingston argued that the new Act should allow judgment in its favor both in the original action filed by the United States, and in the third party action filed by the settling PRPs. Livingston admitted that the plain language of 42 U.S.C. § 9627(i) would not allow judgment in its favor with regard to the action filed by the United States, but argued that the “spirit and intent” of the legislation called for such a result.²⁸ The court disagreed, finding that the plain language of the new statute “precludes its applicability.” The court acknowledged that while the new law may affect the viability of existing case law concerning the useful product defense, the previous decision overruling Livingston’s motion for summary judgment was properly based on legal precedent in effect at the time the ruling was made, eight years before the new law was enacted.²⁹

The second issue the court addressed was the application of the new law to the third party action. Livingston argued that the third party claim was a separate action, not initiated by the United States, and therefore the new law would apply.³⁰

The court noted the Senators’ remarks in the Congressional Record that seemed to support Livingston’s argument: “[f]or purposes of this section, Congress intends that any third party action or joinder of defendants, brought by a private party shall be considered a private party action, regardless of whether or

not the original lawsuit was brought by the United States.”³¹ The court, however, did not find these remarks to be persuasive. The court noted that these remarks were simply read into the record without an indication of their source, and stated that it “has found not true legislative history with respect to [42 U.S.C.S. § 9627(i)] which would support [the Senators’] interpretation of the provision.” The court found that the remarks in the Congressional Record, and Livingston’s argument, failed to make the proper distinction between a “claim” and an “action.” An “action” can be made up of numerous “claims,” including the complaint, cross-claims, counter-claims, and third-party claims. Since all of the claims are part of the same judicial action, and that action was originally brought by the United States, the provisions of the Act do not apply.³²

The court held that the ongoing case “as a whole” was a judicial action initiated by the United States and therefore fell outside the new law.³³ To hold otherwise would allow the United States to pursue the settling PRPs while prohibiting that group from pursuing third party claims against other PRPs. The court believed that allowing this result would punish the settling PRPs for accepting responsibility and settling with the government.³⁴

This issue and many others associated with the new law will be the subject of many court decisions in the coming years. At a minimum, the law creates another area of inquiry for federal agencies as they investigate their potential liability for clean-up costs at sites around the country. Major Romans.

26. *Id.* at 831, n.2.

27. *Id.* at 831.

28. *Id.*

29. *Id.* at 832.

30. *Id.*

31. 145 CONG. REC. S15050 (daily ed. Nov. 19, 1999) (statement of Senators Lott and Daschle).

32. *Atlas Ledered Co.*, 97 F. Supp. 2d at 833.

33. *Id.*

34. *Id.*